No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE ROSEBUD SIOUX TRIBE, THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, *et al.* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are six federally recognized Indian tribes, one tribal tax commission, and one national Indian organization.[2] *Amici* have a substantial interest in the issue raised in

[1] Counsel for Petitioner and counsel for Respondent have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

[2] The National Congress of American Indians (NCAI) is the oldest and largest national organization of Indian governments and individuals in

this case. The issue involves the scope of a fundamental doctrine of Indian law – the right of Indian tribes and their members to be free from state jurisdiction under federal law.

Amici tribes currently exercise their sovereign authority over their Indian lands, including lands held in trust by the United States for the tribe and lands allotted by the United States to individual members of the tribe and held in trust for the members. They do so under decisions of this Court and under statutes of the United States Congress confirming their sovereign rights.

The State of Oklahoma in this case concedes that Indian tribes have the right to so exercise their sovereign powers on such lands. And the State concedes that, by virtue of tribal sovereignty and federal law, tribes and their members generally would be immune from state jurisdiction on land which has been formally designated as an Indian reservation.

Notwithstanding these concessions, however, the State of Oklahoma is attempting to tax the income of members of the Sac and Fox Nation who work for the Tribe on tribal trust land but who do not live on that land. The State is also attempting to impose certain motor vehicle taxes and license and registration fees on the personal motor vehicles of tribal members. The State's theory is that the situation of the Sac and Fox Nation – and presumably those of the other 30-some Indian Nations in Oklahoma – is different because the bulk of its lands has been allotted and is held in trust for tribal members.

Amici vehemently oppose the State's exercise of jurisdiction in this case and the State's theory for the exercise of such jurisdiction. The exercise of state jurisdiction over tribal members on Indian lands significantly threatens the inherent rights, confirmed in treaties with the United States and promoted under current federal policy, of all Indian tribes to be

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the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties and agreements with the United States.

self-governing and free from state jurisdiction within Indian territory. *Amici* urge this Court to adhere to the longstanding principles expressed in its cases that these rights are properly applicable to both tribal trust land and allotted lands such as are involved here.

SUMMARY OF ARGUMENT

Absent express consent of Congress, a state cannot exercise jurisdiction over Indians in Indian territory. This Court has long protected the immunity of Indians in Indian territory from unauthorized state jurisdiction. The Court's continued protection is particularly warranted where, as here, without relying on any express statutory provision, the State seeks to tax the income of tribal members who work for the Tribe on land held in trust for the Tribe. The State's demand for a rule that requires the tribal members also to live on the tribal trust land is a specious argument that should be rejected by this Court.

Alternatively, assuming *arguendo* that residency in Indian territory is a prerequisite to the application of the Indian immunity doctrine, cases of this Court establish that at least those tribal members who live on trust allotments are protected from state jurisdiction here. The cases and federal statutes have long determined that trust allotments, having been validly set apart for the Indians' use and being subject to federal protection, are the equivalent of formal Indian reservations and other tribal trust land for purposes of the Indian immunity doctrine. Again, the State points to no express provision of Congress otherwise. A review of allotment and cession acts of the late nineteenth century such as are involved in this case confirms that, notwithstanding allotment in severalty of tribal lands to individual tribal members, Indian immunity from state jurisdiction was intended to be preserved on the trust allotments.

The State's fallback arguments, that the reservation boundaries in this case have been disestablished, and that Indian tribes and lands in Oklahoma are somehow different from those elsewhere, are meritless. This Court quite recently

treated an Indian tribe in Oklahoma the same as other tribes for purposes of the very immunity doctrine at issue here. Other cases of the Court firmly establish that questions of boundary disestablishment are irrelevant to issues of jurisdiction over tribal trust lands and trust allotments. Hence, the lands in this case are protected by the Indian immunity doctrine.

The United States as *amicus curiae* in this case advances a novel "hybrid" theory – that Indian activities on allotted lands within a former reservation area are presumptively subject to both tribal jurisdiction *and* state jurisdiction, unless the tribal members have maintained a "reservation community" sufficient to oust state jurisdiction. Such a theory is not only unprecedented it is contrary to decisions of this Court and congressional enactments which have long equated trust allotments with reservations and tribal trust land for jurisdictional purposes.

Efforts by states to tax and regulate tribal Indians similar to the State's efforts here have been soundly rejected by this Court. The same result is called for here. Accordingly, the State's asserted jurisdiction must fail on the grounds that it is preempted by federal law or, alternatively, that it infringes on the conceded right of Indian tribes to make their own laws and be ruled by them.

ARGUMENT

I. FEDERAL LAW BARS THE STATE FROM TAXING INCOME EARNED BY TRIBAL MEMBERS FOR WORK DONE FOR THE TRIBE ON TRIBAL TRUST PROPERTY

A fundamental doctrine of federal Indian law is that land set aside for Indians is territory over which Indian tribes are self-governing and from which state jurisdiction is generally excluded. *See generally McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-171 (1973). This doctrine of Indian immunity is based on the separate sovereign status of Indian tribes and the ensuing federal-tribal relationship manifested in treaties and other federal law and policy. *Id.* at 168-69. The

doctrine has been ingrained in decisions of this Court since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Most recently the Court noted that Congress' exemption of Indians from state jurisdiction on Indian lands is grounded in its constitutional authority under the Commerce and Treaty Clauses. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S.Ct. 683, 687 (1992).

This "deeply rooted" Indian immunity doctrine applies forcefully in the area of taxation. *McClanahan*, 411 U.S. at 168. Indeed, this Court has held repeatedly that Indian tribes and individuals are "per se" exempt from state taxation in their territory. *County of Yakima*, 112 S.Ct. at 692.[3] While Congress can authorize state taxation of the activities and property of Indians, it must do so with "unmistakably clear" intent. *Id.* at 688.[4] A state's right to tax Indians in Indian territory will not be lightly inferred by the courts. *Id.*

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[3] Petitioner Oklahoma Tax Commission (hereinafter "the State") fails to appreciate that the Indian immunity doctrine protects *both* Indian tribes and individual tribal members. The State seemingly characterizes the doctrine as applying only to instances where a state is directly regulating an Indian tribe. State's Op. Br. at 7. The State (and the United States, Br. of U.S. as *Amicus Curiae* at 18) relies on this Court's decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905 (1991), for its proposition but that reliance is misplaced. A tribe was involved in that case. But it is a *non sequitur* to suggest that therefore the doctrine applies only to tribes. To regulate tribal members in Indian territory necessarily implicates the tribe, whose right it is to regulate them. The state may not do so. *See, e.g., McClanahan*, 411 U.S. at 168-71 (state cannot tax personal income of Indian individual); Bryan v. Itasca County, 426 U.S. 373 (1976) (state cannot tax personal property of Indian individual); *see also* Section B of this Part of this Brief, regarding infringement on tribal self-government.

[4] In light of these principles, the State's point, State's Op. Br. at 7-8 and 10-11, that, in holding that the state taxes here are unauthorized, the Court of Appeals below incorrectly failed to rely on a specific federal statute, is wrong. The starting point for the analysis of whether a state has jurisdiction over Indians in Indian territory is the Indian immunity doctrine,

The Indian immunity doctrine, like similar sovereignty-based doctrines, has a significant territorial basis. In *Worcester v. Georgia*, the Court noted that Congress has always:

> [M]anifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

31 U.S. at 555. The principle that territory provides the basis for the application and exercise of many Indian rights has endured.[5] "The Court has repeatedly acknowledged that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption [of state jurisdiction] inquiry." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). In essence, part of the preemptive force behind the Indian immunity doctrine is the reserving or setting apart by Congress of territory for Indians.

This Court aptly recognized this principle in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905 (1991). *Citizen Band Potawatomi* held that, absent express congressional intent otherwise, activities between an Indian tribe and tribal members on a parcel of land held in trust for the tribe are immune from state jurisdiction. 111 S.Ct. at 910. The State there argued vigorously that the tribal trust land was not a formal

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which is essentially a presumption that the state lacks jurisdiction. *County of Yakima*, 112 S.Ct. at 688 and 692. The burden is then on the state to show that Congress has expressly authorized state jurisdiction. *Id.* By arguing that tribes must show in the first instance a federal law ousting state jurisdiction, the State here perverts the applicable test. *McClanahan*, upon which the State relies for its preemption argument, specifically recognizes the rule against state taxation without express congressional authority. 411 U.S. at 170-71.

[5] *But cf., e.g.*, Menominee Tribe v. United States, 391 U.S. 404 (1968) (Indian treaty hunting and fishing rights survive congressional act terminating tribal status and reservation).

Indian reservation. In rejecting that argument as being dispositive of the immunity issue, the Court stated:

> Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634 [] (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' . . . Here . . . the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*, we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes.

112 S.Ct. at 910 (some citations omitted).[6]

The income of tribal members at issue in this case is earned at least principally if not wholly on land held in trust for the Sac and Fox Nation (hereinafter "the Tribe").[7] While the United States argues, Br. of U.S. as *Amicus Curiae* at 17-18, that in *McClanahan* it was important that the individual Indian resided on the reservation, the authority for that

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[6] The "validly set apart" rule as it pertains to tribal lands has long been established, regardless of whether such lands are part of a formal reservation. *See, e.g.*, United States v. John, 437 U.S. 634 (1978) (parcel of tribal trust land); Mattz v. Arnett, 412 U.S. 481 (1973) (undisposed-of ceded land restored by Congress to tribal ownership); United States v. McGowan, 302 U.S. 535 (1938) (lands purchased out of federal funds and occupied by tribe); United States v. Sandoval, 231 U.S. 28 (1913) (lands of Pueblo tribes held in fee); Donnelly v. United States, 228 U.S. 243 (1913) (executive order tribal lands); Bates v. Clark, 95 U.S. 204 (1877) (lands in original Indian title); *and see generally* F. Cohen, *Handbook of Federal Indian Law* 27-41 (1982 ed.).

[7] It is common ground that there was never a cession of the tribal trust land in this case. State's Op. Br. at 2; Br. of U.S. as *Amicus Curiae* at 11.

position is unclear. There is no sign in *McClanahan* that the case turned on residency. Residence was relevant there as an indication that the case did not involve "Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." 411 U.S. at 167. Where, as here, there is a fully functioning tribal government hiring tribal members to work on tribal trust land, the necessary assurances are present that assimilated Indians are not involved.[8] The State acknowledges the Tribe's right to self-government here, as this Court did for a similarly situated tribe in *Citizen Band Potawatomi*.[9] There is thus no principled way of distinguishing this case from *McClanahan* regarding the income tax and hence that tax is invalid.[10]

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[8] These factors make application of the Indian immunity doctrine reasonable notwithstanding hypothetical residence of tribal members in Oklahoma City. *See* Br. of U.S. as *Amicus Curiae* at 18-19. And, while Ms. McClanahan did reside on a reservation, she apparently did not work for the Tribe, making the present case even stronger.

[9] The State, however, also argues that it has "assumed the burden" of being the government primarily responsible for the welfare of Indians in Oklahoma. State's Op. Br. at 11 and 13. This self-actualizing theory is plainly at odds with decisions of this Court which hold that only Congress can grant a state jurisdiction over Indians in Indian territory, *e.g.*, Fisher v. District Court, 424 U.S. 382 (1976), as well as with modern federal Indian law and policy, *e.g.*, Public Law 280 of 1953, *as amended*, 25 U.S.C. §§ 1321-23 (providing, *inter alia*, that states can only assume jurisdiction over Indians under Public Law 280 with consent of Indian tribe).

[10] The argument advanced by the *amici* states does not compel a conclusion otherwise. Br. of States as *Amicus Curiae* at 8-11. The states point out that, outside the area of Indian law, where an individual resides in one state but works in another, as a general rule both states are entitled to tax the individual's income. However, the states cite no authority for the proposition that this rule applies in an Indian law setting. Indeed, this Court has cautioned that the "unique historical origins of tribal sovereignty make it generally unhelpful" to apply the rules of non-Indian law to an Indian law setting. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). "Tribal reservations are not States. . . . The tradition of Indian sovereignty over the reservation and tribal members must inform the

II. IF RESIDENCY IS A FACTOR, THE COURT OF APPEALS CORRECTLY HELD THAT THE STATE IS BARRED BY FEDERAL LAW FROM TAXING OR OTHERWISE EXERCISING JURISDICTION OVER TRIBAL MEMBERS ON ALLOTTED LANDS

A. This Court And Congress Have Consistently Treated Allotted Lands Like Formal Indian Reservations And Other Tribal Trust Lands; Hence, The Federal Indian Law Doctrine Of Indian Immunity From State Jurisdiction Applies To The Activities Of Tribal Members On Allotted Lands

As *amici* have shown, the Indian immunity doctrine is a fundamental general principle of Indian law.[11] Without a doubt it would apply to oust the state regulation of tribal members at issue here if the Tribe's lands were a formal Indian reservation. State regulation, however, also is ousted even though some of the Tribe's lands have been allotted and are held in trust for tribal members.[12]

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determination whether the exercise of state authority has been pre-empted by operation of federal law." *Id.*

[11] Another principle applicable here is that the principles of Indian law typically apply across the board to all tribes (and all states), notwithstanding the fact that the United States historically often treated only with particular tribes or groups of tribes. *See generally* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983) (discussing breadth of Indian law preemption rules). Thus, despite the State's argument otherwise, State's Op. Br. at 7 & 10-11, the gist of *McClanahan* was not that there were "specific" provisions of the Navajo Tribe's treaty that determined the outcome in that case. *McClanahan* does not hold nor should it be read to hold that the Navajo Tribe and only the Navajo Tribe is entitled to the Indian immunity doctrine. Rather, *McClanahan* stands for the principle that the Indian immunity doctrine generally and presumptively applies in Indian territory unless Congress expressly provides otherwise.

[12] The *amici* states in support of the State in this case argue that decisions of this Court, namely, *McClanahan* and Williams v. Lee, 358 U.S. 217 (1959), conclusively resolve the issue of state jurisdiction over

1. Under a long line of cases from *United States v. Pelican* to *Citizen Band Potawatomi*, the test for territory to which the Indian immunity doctrine applies is whether the land has been validly set apart for the Indians and is subject to federal protection, and trust allotments meet that test

The allotted lands here are concededly within the area once set apart as a reservation for the Tribe.[13] A "validly set apart" rule similar to the rule affirmed in *Citizen Band Potawatomi* for tribal lands has been applied to such allotted lands. Hence the State's argument that allotted lands are not

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tribal members on allotted lands in their favor. Br. of the States as *Amicus Curiae* at 4-7. Their argument is based on the appearance of the terms "Indian reservation" and "reservation Indians" in the decisions. Taking this language literally, the states argue that in the absence of a formal reservation, tribal members are automatically subject to state jurisdiction.

The states clearly overstate the use of these terms, especially in light of *Citizen Band Potawatomi*. In addition, some cases simply refer to the rule as being that against state taxation of "tribal members" or "Indian individuals" without using the term "reservation." *E.g., County of Yakima*, 112 S.Ct. at 692; Montana v. Blackfeet Tribe, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. Other cases such as Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 834 (1982), which found preemption of a state tax on a non-Indian company, involved tribal trust and allotted land. In any event, the *amici* states merely beg the question presented in this case of whether allotted lands are the equivalent of a reservation for purposes of the jurisdictional assertion here.

[13] The State in this case argues that the boundaries of the Sac and Fox Reservation were "disestablished" by the Allotment and Cession Agreement between the Tribe and the United States which was ratified by the Act of February 13, 1891, 26 Stat. 749. State's Op. Br. at 6-10. *Amici* express no opinion in this Brief on the merits of the disestablishment issue. Such an opinion is unnecessary because, as we show in Part III of the Brief, the issue of boundary disestablishment is irrelevant as a matter of law to questions of jurisdiction over tribal and allotted lands held in trust which are within the original boundaries.

entitled to application of the Indian immunity doctrine must fail here as it did in *Citizen Band Potawatomi*.

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court stated that "Indian allotments, the Indian titles to which have not been extinguished," are subject to federal and tribal jurisdiction. 420 U.S. at 427 n.2. "It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities." *Id.* at 428. And the Court explained why. Noting that the tribe in *DeCoteau* had, in an Allotment and Cession Agreement similar to that of the Tribe's here, ceded all lands except those allotted to tribal members, the Court stated:

> But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that *retention of allotments would provide an adequate fulcrum for tribal affairs*.

Id. at 446 (emphasis added), *citing United States v. Pelican*, 232 U.S. 442 (1914).[14]

United States v. Pelican involved jurisdiction over allotted lands on the Colville Indian Reservation. The Court there stated the following:

> [T]he original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands. . . . The allottees were permitted to enjoy a more secure tenure, and

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[14] In the next subsection of this Brief, *amici* will show how the Court's statement about allotted lands being an "adequate fulcrum for tribal affairs" follows directly from the instructions of the Department of the Interior to the federal commissions that negotiated the allotment and cession agreements with the tribes. The commissioners were told, notwithstanding the cessions extracted from the tribes, to leave the tribes with some form of a land base over which they could continue their tribal relations, whether that be diminished reservations or allotted lands.

> provision was made for their ultimate ownership without restriction. But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings. . . .

232 U.S. at 449 (citations omitted).

In *United States v. Rickert*, 188 U.S. 432 (1903), the state was taxing the improvements and personal property of tribal members on allotted lands located within the original boundaries of the Sisseton-Wahpeton Sioux Reservation, the same reservation involved in *DeCoteau*. Twelve years after the reservation had been, as this Court held in *DeCoteau*, "terminated" by the allotment and cession act, the Court struck down those taxes, reasoning that as long as the allotted lands were held in trust, the state was without power to tax absent congressional authority otherwise. 188 U.S. at 437. While the Court at the time of *Rickert* viewed the allotted lands as a "federal instrumentality," the Court also relied on federal Indian policy and cited to several Indian law cases for its holding. *Id.* at 437-39. And, importantly for purposes of this case, the Court saw the allotted lands as being no different from other Indian lands, such as reservations and tribal trust lands, which it also viewed as federal instrumentalities. *Id.* at 441.

DeCoteau, *Pelican*, and *Rickert* make clear that, at least regarding the application of the Indian immunity doctrine, allotted lands are the equivalent of reservations and other tribal trust lands. *See also Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (noting that this Court historically has defined Indian lands as including all lands in which "the Indians held some form of property interest," including tribal trust lands and "individual allotments"). Like reservation and tribal lands, allotted lands have been validly set apart for the Indians' use and are subject to federal protection. In other words, they are Indian trust lands. The fact that they are held in trust for individual tribal members rather than the tribe is simply irrelevant for jurisdictional purposes.

Congress has long adhered to this view. In 1948, Congress enacted the Indian Country Statute, 18 U.S.C. § 1151. It provides in pertinent part:

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.[15]

Section 1151 was the first comprehensive definition by Congress of the geographic territory over which federal and tribal jurisdiction is permitted and from which state jurisdiction is generally excluded. Like reservations and other Indian areas, allotted lands expressly are within that definition because, in Section 1151, Congress was essentially codifying the validly set apart test of this Court. Indeed, the State does not argue that the allotted lands here are not within the statutory definition of Indian country.[16]

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[15] Although Section 1151 is contained in the federal criminal code, this Court has held that "[t]his definition applies to questions of both criminal and civil jurisdiction." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987), *citing DeCoteau*, 420 U.S. at 427 n.2. *DeCoteau* in fact was a case involving questions of both criminal and civil jurisdiction. *Id.* at 430-31.

[16] The United States concedes in this case that allotted lands are within the statutory definition of Indian country at least for purposes of criminal jurisdiction. Br. of U.S. as *Amicus Curiae* at 17. The United States argues, however, that the allotted lands are not a "reservation" as that term is used in federal Indian statutes. *Id.* at 12. In support of this argument, the

Other statutes make clear that Congress equates allotted lands with reservation and other tribal lands for purposes of

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United States relies on an Opinion of the Secretary of the Department of the Interior, 59 Op. Interior Dep't. 1 (1945), which in turn relies on this Court's decision in United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206 (1943).

That argument misses the point. While both the Interior Department Opinion and *United States v. Oklahoma Gas & Elec. Co.* determine that allotted lands are not a "formal reservation" within the meaning of certain federal rights-of-way statutes, they do not reach the issue of whether the allotted lands are nevertheless land over which the principles and doctrines of Indian law apply. The Tribe here need not argue that allotted lands are a formal reservation since, under pertinent cases such as *Pelican* and *Citizen Band Potawatomi*, that is not the test.

It is curious, however, that in *Citizen Band Potawatomi*, a civil case involving application of the Indian immunity doctrine, the United States argued that "allotments within the original reservation boundaries that are still held in trust are 'Indian country' under 18 U.S.C. § 1151(c), and are therefore subject to the jurisdiction of the United States and the Tribe, rather than the State." Br. of U.S. as *Amicus Curiae* (*Citizen Band Potawatomi* case) at 26 n.20.

In this case, the United States advocates – for the first time ever – that the test for application of the Indian immunity doctrine in cases involving allotted lands is whether the tribal members have maintained a "reservation community." Br. of U.S. as *Amicus Curiae* (*Sac and Fox* case) at 18-20. Not only does the United States fail to explain its inconsistent positions, it cites no authority for the origin of this reservation community test.

Nor does the United States explain why, in light of the express inclusion of allotted lands in Section 1151(c), a separate test such as the showing of a reservation community is necessary to resolve jurisdictional issues on allotted lands. Such a test would merely provide a means by which, if the test is met, tribal members on allotted lands are entitled to no more than that which they already have under Section 1151(c). Also, 1151(c) would not have any independent meaning if the allotments must be within a reservation to be entitled to jurisdictional immunity. Section 1151(a) already makes all land within a reservation Indian country. *See DeCoteau*, 420 U.S. at 429 n.3 (Section 1151(c) "contemplates that isolated tracts of 'Indian country' may be scattered checkerboard fashion over a territory otherwise under state jurisdiction").

jurisdiction. Recent laws, like the Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(10) and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2703(4), expressly include allotted lands within the territorial definitions of Indian lands. And, as the United States points out, Br. of U.S. as *Amicus Curiae* at 14-15 n.11, the Burke Act of 1906, Act of May 8, 1906, 34 Stat. 183, which was a proviso added to the General Allotment Act of 1887, 25 U.S.C. §§ 348-349, strongly supports the Tribe's position here. Not only did the Burke Act expressly confirm the circumstances under which allotted lands would be subject to state jurisdiction, namely, upon the expiration of the trust period and the issuance of a fee patent, the Burke Act does not on its face exempt the allotted lands such as are involved in this case from such provisions. The clear implication is that Congress intended that the allotted lands here be treated no differently.

Essentially, the State's argument in this case reduces, as it did in *Citizen Band Potawatomi*, to its theory that Indian tribes and Indian lands in Oklahoma are somehow "different" from those elsewhere. The State's main authority for its point here are pre-*Citizen Band Potawatomi* cases or statements by this Court involving Oklahoma Indians. At the outset, it should be noted that none of these cases speak to the issue here. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), involved the application of federal and state law to the personal property of Indian individuals located on fee

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Also unexplained is how, if at all, the reservation community test differs from the definition of dependent Indian community in Section 1151(b) as that term has been construed by the courts. *E.g.*, United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). The United States argues, Br. of U.S. as *Amicus Curiae* at 19, that its reservation community test could apply not only to tribal members who live on allotted lands but also to members who live on land that is near a reservation but beyond the reservation boundaries. Where lands near a reservation are involved, there is already the dependent Indian community test, and such lands are precisely the type of lands to which the dependent Indian community test applies. *See, e.g., United States v. South Dakota*, 665 F.2d at 839.

lands. *Leahy v. State Treasurer*, 297 U.S. 420 (1936), involved state taxation of income earned from mineral rights on a restricted fee allotment. The allotted lands here are not merely subject to restrictions on alienation, they are in trust.

Moreover, the State's cry for an exemption for Oklahoma tribes from the principles and rules of Indian law was soundly rejected by this Court in *Citizen Band Potawatomi* and should be done so again here. It is true that Oklahoma tribes were subjected to the federal allotment policy of the late nineteenth century. But so were Indian tribes and reservations elsewhere, and the policy of allotment was halted and reversed by Congress before it ever reached its ultimate goals. *County of Yakima*, 112 S.Ct. at 686.[17]

In sum, while most, if not all, of the Indian immunity doctrine cases to date have involved principally or wholly situations on reservations or other tribal lands, *United States v. John* and *Citizen Band Potawatomi* unequivocally show that the absence of a formal reservation is not the determining factor for whether the doctrine applies. Rather, the test is whether the lands have been validly set apart for the Indians'

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[17] Throughout its Brief, the State tries to make much of the fact that allotted lands are often "scattered" amidst land that is held in fee. Such a situation did not persuade this Court in *DeCoteau* to hold other than it did with respect to the allotted lands there which were also scattered amidst a former reservation area. 420 U.S. at 429 n.3; *see also* Seymour v. Superintendent, 368 U.S. 351 (1962) (state lacks jurisdiction over Indian on non-Indian fee land located within public townsite on reservation); *and cf.* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (non-Indian fee land scattered amidst Indian land within a reservation may be subject to state zoning jurisdiction).

However, the State's characterization, State's Op. Br. at 8, of allotted lands as a "base" which Indians "tag" from time to time to avoid being subject to state jurisdiction is offensive and hardly describes the land on which Indian people live, maintain homes, and raise families. With official attitudes such as that, it is not surprising that "[t]he policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *McClanahan*, 411 U.S. at 168.

use and are subject to federal protection. Cases of this Court and congressional intent as manifested in federal statutes compel the conclusion that trust allotments meet that test.

2. Allotment and Cession Acts such as the one involved here are not express congressional authorization to depart from these long-standing rules

As we have shown, the doctrine of Indian immunity from state jurisdiction applies generally to allotted lands. The burden is then on the State to show that Congress has expressly authorized an exception to this general rule. The statute upon which the State here relies is the Act of February 13, 1891, 26 Stat. 749 (hereinafter "the 1891 Act"). The 1891 Act ratified an Allotment and Cession Agreement of 1890 which the Tribe entered into with the United States pertaining to its reservation provided by the Treaty of 1867, 15 Stat. 495.[18]

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[18] An agreement with an Indian tribe ratified by an act of congress must be construed as a statute. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 560-61 (1903) (construing an act ratifying an agreement); *accord DeCoteau*, 420 U.S. at 444-49 (construing act contemporaneous with 1891 Act here); see also Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594-98 (1977) (cession agreement ratified by act of Congress presents question of congressional intent). In addition, questions of tax immunities and preemption of state law on Indian lands are essentially questions of congressional intent. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175-76 (1989).

Thus, the issue of the effect of the 1891 Act on the Indian immunity doctrine is fundamentally one of statutory construction. The question is whether Congress intended to divest the allotted lands of their immunity from state jurisdiction. If the statutory language is unclear regarding congressional intent, courts may look to the legislative history and circumstances surrounding the passage of an act to determine that intent. Other legal principles such as the doctrine of tribal sovereignty are also relevant to determining congressional intent in Indian law. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 163.

At the outset, it must be noted that nothing in the 1891 Act expressly authorizes the state jurisdiction at issue here. For example, the Burke Act of 1906, 25 U.S.C. § 349, was construed in *County of Yakima* to authorize state *ad valorem* taxes on certain land owned in fee by Indians. 112 S.Ct. at 688-93. The State nevertheless relies on the 1891 Act for its taxing and regulatory authority.

Far from authorizing state jurisdiction, laws such as the 1891 Act intended to preserve rights such as the Indian immunity doctrine notwithstanding allotment of reservation lands to Indian individuals. This conclusion follows from decisions of this Court and other courts construing similar allotment and cession acts as well as the history and the historical circumstances of such acts.

In *DeCoteau*, this Court construed the Act of March 3, 1891, 26 Stat. 989, 1036, an act which ratified an allotment and cession agreement with the Sisseton-Wahpeton Sioux Tribe. As the State concedes, State's Op. Br. at 9, the Sisseton-Wahpeton Act is very similar to the 1891 Act here. The Court in *DeCoteau* held that, notwithstanding the Act, jurisdiction over Indians on the lands allotted to individual tribal members was with the federal and tribal governments, not the state. 420 U.S. at 427-28.

In *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983), the Supreme Court of Oklahoma reached the same conclusion regarding the Act of October 21, 1892, 31 Stat. 676, which ratified the Allotment and Cession Agreement with the Kiowa Tribe. The State concedes that act is similar to the 1891 Act. State's Op. Br. at 12. In *Ahboah*, the housing authority argued that Act divested the allotted lands of the Indian immunity from state jurisdiction. That "position is untenable as it ignores dispositive holdings of the United States Supreme Court." 660 P.2d at 628. The Oklahoma Supreme Court cited several cases such as *United States v. Pelican* that found no expression of congressional intent in allotment acts to divest allotted lands of their immunity. *Id.*

The State and the United States argue or imply that the effect of the 1891 Act here is different from the effect of the acts involved in *DeCoteau* and *Ahboah*. In *DeCoteau*, this

Court construed the Sisseton-Wahpeton Act to mean that the tribe ceded all its lands except those allotted to tribal members. 420 U.S. at 438-39. In *Ahboah*, the court refused to find that the Kiowa Tribe had ceded its allotted lands by its allotment and cession act. 660 P.2d at 628. In the view of the State and the United States, by the 1891 Act the Tribe here ceded its allotted lands. State's Op. Br. at 9-10; Br. of U.S. as *Amicus Curiae* at 9-10, 12-15. That attempt at distinction unnecessarily places form over substance.

The allotment and cession agreements of the Sisseton-Wahpeton Sioux and Kiowa Tribes were negotiated by the same or similar federal commissions that negotiated the agreement of the Tribe here and such agreements with many tribes in Oklahoma Territory and elsewhere. *See DeCoteau*, 420 U.S. at 439 ns.21 & 22. But, since various commissioners handled various negotiations, the drafting of particular agreements may vary somewhat from tribe to tribe, and hence this Court should refrain from overemphasizing the provisions of any one particular act.

More appropriate in determining the intent of the acts are the instructions such as those from the Secretary of the Department of the Interior to the Commissioner of Indian Affairs who in turn instructed the commissioners regarding negotiations with the Oklahoma tribes. Instructions to the Jerome Commission from the Commissioner of Indian Affairs, Record Group 48, Records of the Office of Indian Affairs, Letters Sent, 184 Land Letter Book at 164-258 (May 9, 1889), *pages 1-78 reprinted in* S. Exec. Doc. No. 78, 51st Congr., 1st Sess., 1-31 (1890), and *pages 78-94 reprinted in* B. Chapman, "Secret 'Instructions and Suggestions' to the Cherokee Commission," 26 The Chronicles of Oklahoma 449, 451-58 (1948-49).

The Jerome Commission (also known as the "Cherokee Commission") was instructed generally to negotiate with the tribes, including the Sac and Fox, for cessions of their reservations. S. Exec. Doc. No. 78 at 1-2; 26 The Chronicles of Oklahoma at 452-53 and 456. However, the Commission was also specifically instructed that:

[W]hile the Act authorizing negotiations provides for the extinguishment of the Indian title to all lands lying west of the 96th degree, no provision is made for the location and settlement elsewhere of the Indians occupying said lands. It will therefore be necessary in the event of successful negotiations with such Indians as occupy lands lying west of that degree, for the cession thereof, *to provide new reservations* suitable to the requirements of each band within the reservation now occupied by such band, *or to provide for allotments in severalty within the reservation now so occupied* or to provide new reservations, or for the allotment of lands in severalty in some other portion of the country lying west of that degree, or to provide for the removal of the Indians to lands east of said degree, and in the latter case negotiations for that purpose would be necessary with the Indians owning the lands lying east of that degree.

> It may also be said here that if the Commissioners shall find it impossible to secure a cession of all the lands lying west of the 96th degree, owned or claimed by any of the several nations or tribes, *they may negotiate for such modifications of existing reservations* and claims as the said nations or tribes may severally agree to.

26 The Chronicles of Oklahoma at 457 (emphasis added).

As the instructions show, the Jerome Commission had wide latitude to ensure that, notwithstanding the cessions, the Oklahoma tribes, including the Sac and Fox, retained some form of a land base, whether that be reservation land or allotted lands. The land base was necessary so the Indians could continue their tribal relations. The continuance of tribal relations was assumed and was intended to be protected. And, as this Court held succinctly in *DeCoteau*, "the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs." 420 U.S. at 446. In short, allotment and cession acts were intended to meet tribal needs as well as those of non-Indians.

Further, under the State's and United States' cession theory, the 1891 Act amounted to a land transaction as follows: the Tribe ceded all land within the original boundaries of its 1867 reservation except the two parcels of tribal trust land; some of the ceded land was then reserved back instantaneously to tribal members in the form of allotments. That theory is incorrect, especially when "[t]here was no interruption in the right of the Indians to occupy such lands. . . . [and] [t]he agreement . . . did not discontinue tribal relations." *Tooisgah v. United States*, 186 F.2d 93, 103 (10th Cir. 1950) (Phillips, C.J., dissenting) (construing allotment and cession act of the Kiowa Tribe discussed, *supra*, in the *Ahboah* case).

Chief Judge Phillips underscores precisely why allotted lands, though held by individual tribal members, are much more like reservations and other tribal trust lands than they are like ceded lands. Allotted lands, tribal trust lands, and reservations are all subject to Indian title and occupancy. "Ceded" means that the land was separated from the Indians, that they lost title and the right of occupancy. That does not happen with allotted lands just like it does not happen with reservation or tribal trust lands. This Court held in *United States v. Pelican* that:

> The [reservation] lands, which prior to the allotment, undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy . . . [and] when the reservation was diminished, [the allotments] were excepted from the portion restored to the public domain.

232 U.S. at 449. Indeed, that is why the Agreements are called "Allotment *and* Cession Agreements." Some land is allotted and some is ceded. But allotted land is not ceded.[19]

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[19] Even assuming *arguendo* that allotted lands were among those ceded, it does not follow that such a title transfer necessarily grants state jurisdiction over them. The United States cites no authority for its theory that the title implications of the 1891 Act in and of themselves resolve the issue of state jurisdiction. Jurisdictional issues in Indian law are first and

This Court routinely refers to "ceded" or "surplus" land as "unallotted" land. *E.g.*, *DeCoteau*, 420 U.S. at 434 and 442.

Moreover, in cases as here where, notwithstanding allotment, inherent tribal powers were not diminished, the theory that allotted lands were ceded becomes absurd. Under such a theory, tribes had little, if any, territory on which to exercise their inherent authority after allotment. It is ludicrous to think that laws such as the 1891 Act left tribes "all dressed up but with no place to go," that is, with authority but no place on which to exercise it.

Tribal sovereign interests provide a "backdrop against which the applicable [Indian law] treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172. These interests include the continuance of tribal relations as provided for in laws such as the 1891 Act, and the exercise of tribal sovereignty as discussed in *DeCoteau*, 420 U.S. at 443-444 (tribe there had a written constitution, legal codes, and courts of law); *see also The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-56 (1866) (in concluding that, absent express congressional intent otherwise, tribal members who held restricted fee allotments were entitled to the same rights, including immunities from state taxation, as those members who held their land in common, it was significant that the tribal organization had remained intact and federally recognized).

It is common ground that the Sac and Fox Nation is and always has been self-governing and federally recognized. Congress has never dissolved the tribal government. The Tribe itself has never voluntarily abandoned its government. And this Court recently recognized the sovereign status of a neighboring Oklahoma tribe in *Citizen Band Potawatomi*, 111 S.Ct. at 910.

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foremost questions of congressional intent. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 175-76. Tribes can have jurisdiction over and Indians can have immunities on all kinds of land, even land held in fee by non-Indians. *E.g.*, *Seymour v. Superintendent*, 368 U.S. at 354-58; *and cf.* Montana v. Crow Tribe, 484 U.S. 997 (1988), *aff'g Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987) (denying state authority to tax tribal coal mined in ceded area of reservation).

The intent of Congress that allotted lands such as are involved in this case remain subject to the Indian immunity doctrine is clear.[20] However, assuming *arguendo* that this Court should find it unclear, the Court must apply the Indian law canons of construction. *County of Yakima*, 112 S.Ct. at 693. These canons have particular force in the face of claims such as are present in this case that a statute has by implication abolished Indian tax immunities. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). In the absence of unmistakably clear intent, this Court should not assume that Congress has altered the rules of Indian law, including and especially the Indian immunity doctrine. *Id.* at 388-93.

3. Under *McClanahan*, *Moe*, and *Colville*, the State's taxes and license and registration fees are invalid

As we have shown, allotted lands generally are entitled to the Indian immunity doctrine and the allotted lands here are no exception to this rule. Hence, all of the State's attempted assertions of jurisdiction in this case must fail. This Court previously has denied similar assertions on grounds of the Indian immunity doctrine and Indian law preemption principles. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. at 165 (income tax); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 469 and 480-81 (1976); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-64 (1980) (motor vehicle laws). The State has not shown that Congress has authorized its asserted jurisdiction here with

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[20] In addition, those tribal members who do not reside on allotted lands may nevertheless be entitled to the application of the Indian immunity doctrine by virtue of living in a dependent Indian community. *See* 18 U.S.C. § 1151(b). To the extent the record in this case is unclear to make dependent Indian community determinations, this Court should remand to the district court for such determinations in the first instance.

unmistakably clear intent sufficient to overcome these holdings.[21] Its taxes and regulations are therefore invalid under federal law.

B. Alternatively, The State's Attempted Exercise Of Jurisdiction Here Must Fail Because It Would Infringe On The Tribe's Right To Self-Government

As the State concedes, State's Op. Br. at 10, infringement on tribal self-government is an independent barrier to the application of a state law to Indian lands or to tribal members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. This Court has long recognized that state law may not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Plainly, state jurisdiction in this case would interfere with significant tribal and federal interests, including the

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[21] In *County of Yakima*, this Court emphatically rejected an approach to resolving issues of state taxation on Indians in Indian territory whereby courts would balance the interests of the tribes, states, and the federal government. "Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress." 112 S.Ct. at 693; *cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. at 148 (balancing test may be applied to instances where state seeks to tax non-Indians in Indian territory).

The State nevertheless faults the Court of Appeals below for not engaging in a balancing test. State's Op. Br. at 7-8. And the United States argues that a balancing test is appropriate in cases involving allotted lands. Br. of U.S. as *Amicus Curiae* at 22-23. Under the theory that allotted lands are the same as reservations and tribal lands for jurisdictional purposes, the balancing test is as unnecessary for allotted lands as it is for those other types of Indian lands. However, assuming *arguendo* that this Court should find the balancing test is the appropriate means of resolving this case, as the United States suggests, Br. of U.S. as *Amicus Curiae* at 22-23, remand to the district court for a determination of the respective governmental interests in the first instance would be appropriate.

Indian sovereignty and immunity doctrines and the congressional goal of tribal self-government, especially the "overriding goal of encouraging tribal self-sufficiency and economic development." *Citizen Band Potawatomi*, 111 S.Ct. at 910. The Tribe here is exercising its rights to self-government – confirmed in federal law – by regulating activities on tribal lands and allotted lands. That regulation includes imposing income taxes and motor vehicle tax and regulatory laws like those the State seeks to impose on tribal members. The State concedes that the Tribe in this case may so exercise its sovereign powers. State's Op. Br. at 2, 11-12, and 15.

With respect to taxation, state authority would devastate tribal efforts to raise revenue for valid governmental services that the Tribe provides to all people, Indian and non-Indian, within its jurisdiction. As the United States argues, the state income tax:

> [Q]uite likely . . . directly burdens the administration of the respondent Tribe by increasing the cost of administering tribal affairs, in areas subject to its jurisdiction. . . . Application of the state income tax to tribal members in this case may pose a substantial risk of an infringement on the right of reservation Indians to make their own laws and be ruled by them to the extent it burdens the Tribe's sovereign right to establish relationships with tribal officers and employees on reservation land without state interference.

Br. of U.S. as *Amicus Curiae* at 22. The Tribe, too, has pointed out the irony that the state taxes would perpetuate poverty and unemployment among the Tribe by hindering its opportunities to raise revenue, provide services, and generate employment. Tribe's Br. in Support of its Motion for Summary Judgment, (W.D.Okla. filed Mar. 1, 1991) (No. CIV-90-1553 A), *reprinted in* the Jt. App. filed in this Court at 45-46.

The State errors in arguing that its taxes would impact only Indian individuals, not the Tribe. State's Op. Br. at 7 and 12. In *Bryan v. Itasca County*, where this Court struck down a state tax on the personal property of tribal members, the Court

noted that tribal revenue-raising efforts through taxation "only after the tax base had been filtered through many governmental layers of taxation" would undermine or destroy tribal governments. 426 U.S. at 488 and n.14. In *McClanahan*, the Court stated "we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination." 411 U.S. at 179; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. at 151 (although incidence of state tax was on activities of individuals, ultimate burden of tax was on tribe).[22]

III. THE COURT OF APPEALS CORRECTLY HELD THAT UNDER *SOLEM V. BARTLETT* AND OTHER CASES OF THIS COURT THE EXISTENCE OF THE ORIGINAL BOUNDARIES OF THE RESERVATION IS IRRELEVANT TO ISSUES OF JURISDICTION OVER THE TRIBAL TRUST LAND AND ALLOTTED LANDS HERE

The State argues that the boundaries of the Tribe's reservation were disestablished by the 1891 Act. State's Op. Br. at 6-10. Cases of this Court, however, hold that issues of reservation boundary disestablishment are relevant only to issues of jurisdiction over lands owned in fee by non-Indians. Hence, as a matter of law the disestablishment issue is irrelevant to this case which raises only issues of jurisdiction over activities on tribal trust land and trust allotments.

In *Solem v. Bartlett*, the Court determined whether the boundaries of a reservation had been disestablished, because the underlying issue was whether the state had jurisdiction

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[22] Regulations such as the motor vehicle licensing and registration fee laws present additional problems which this Court has recognized in terms of compliance with dual regulatory schemes. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 338 (denying state authority to regulate hunting and fishing by non-members on a reservation concurrently with tribe).

over a portion of the reservation which had been opened to settlement by non-Indians under an act of Congress. 465 U.S. at 472-81. The Court unequivocally distinguished the effect of reservation boundary disestablishment on non-Indian fee land and its effect on, *inter alia*, allotted lands.

> Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments.

Id. at 467 n.8; *accord DeCoteau*, 420 U.S. at 427 n.2 ("if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished. . . . ' ").

Solem and *DeCoteau* plainly establish that issues of the existence of reservation boundaries are relevant only to issues of jurisdiction over activities on non-Indian fee lands, and are irrelevant to issues of jurisdiction over Indian trust lands.[23] Regarding allotted lands, as noted, *supra*, in this Brief at n. 16, a conclusion otherwise would deprive statutory provisions

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[23] With respect to tribal trust and allotted lands in Oklahoma and elsewhere, this rule has been repeatedly and unequivocally followed by the Court of Appeals for the Tenth Circuit and the Supreme Court of Oklahoma. *E.g.*, Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1420-22 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 581 (1991) (allotted lands remain Indian country even when unallotted lands are ceded or when reservation is terminated); Indian Country U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n, 829 F.2d 967, 975 n.3 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (disestablishment question is relevant only to issues of jurisdiction over non-Indian lands, not tribal lands, trust lands, and allotted lands); Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma, 618 F.2d 665 (10th Cir. 1980) (issue of reservation boundary disestablishment is irrelevant to jurisdiction over tribal trust lands and trust allotments); State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77, 82 (Okla. 1985) (trust allotments of tribe remain Indian country irrespective of existence of reservation boundaries); *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d at 628-29 (individual trust allotments are Indian country, whether within or without continuing reservation boundaries).

such as 18 U.S.C. § 1151(c) of any independent meaning. Section 1151(a) already makes all land within "the limits" of a reservation Indian country. Section 1151(c) is therefore undoubtedly intended to address those instances where allotted lands are not within the reservation limits. *Accord* 25 U.S.C. § 1903(10) (the Indian Child Welfare Act) and 25 U.S.C. § 2703(4) (the Indian Gaming Regulatory Act).

The State contended in *Citizen Band Potawatomi* that the issue of the existence of the reservation boundaries was relevant to the question of the application of the Indian immunity doctrine to a parcel of tribal trust land. In holding that the tribal land was subject to the immunity doctrine, this Court did not address the boundary existence issue. The clear implication is that the Court found it unnecessary to do so because it was irrelevant. The same result is warranted here. This case raises only the issue of Indian immunity on tribal and allotted trust lands. These lands concededly have been in trust continuously since they were reserved by the Treaty of 1867, 15 Stat. 495. Accordingly, this Court should disregard the State's argument to the extent the State is claiming that its jurisdiction over Indian activities on trust lands is based on the disestablishment of the reservation boundaries.[24]

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[24] Alternatively, should this Court find that the existence of the reservation boundaries is relevant to the issues raised in this case, it should remand to the district court for a determination of the merits of this issue in the first instance. In *Solem v. Bartlett*, recognizing the magnitude and importance of a finding of disestablishment, the Court cautioned against generalized, conclusory findings of disestablishment. 465 U.S. at 468-70. Rather, a finding of disestablishment requires a particularized inquiry of applicable laws as well as "pragmatic" factors such as demographics. *Id.* at 471. Such an inquiry involves factual determinations which are not well-suited to the summary judgment posture of this case.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Dated this 21st day of January, 1993.

Respectfully submitted,

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